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| APPLICATION NO.  | FILING DATE | FIRST NAMED INVENTOR | ATTORNEY DOCKET NO. | CONFIRMATION NO. |
|--|-------------|----------------------|---------------------|------------------|
| 09/922,520   | 08/03/2001  | Donald Pham          | 111753              | 8849             |
| 76863 7590 04/24/2009<br>Kraguljac & Kalnay<br>4700 ROCKSIDE ROAD<br>SUMMIT ONE, SUITE 510<br>INDEPENDENCE, OH 44131 |             |                      |                     |                  |
| EXAMINER   |             |                      |                     |                  |
| DUONG, DUC T   |             |                      |                     |                  |
| ART UNIT   |             | PAPER NUMBER         |                     |                  |
| 2419   |             |                      |                     |                  |
| NOTIFICATION DATE  |             | DELIVERY MODE        |                     |                  |
| 04/24/2009   |             | ELECTRONIC           |                     |                  |

**Please find below and/or attached an Office communication concerning this application or proceeding.**

The time period for reply, if any, is set in the attached communication.

Notice of the Office communication was sent electronically on above-indicated "Notification Date" to the following e-mail address(es):

mary@kkpatent.com  
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### Office Action Summary

**Application No.**

09/922,520

**Applicant(s)**

PHAM ET AL.

**Examiner**

Duc T. Duong

**Art Unit**

2419

**-- The MAILING DATE of this communication appears on the cover sheet with the correspondence address --**  
**Period for Reply**

A SHORTENED STATUTORY PERIOD FOR REPLY IS SET TO EXPIRE 3 MONTH(S) OR THIRTY (30) DAYS, WHICHEVER IS LONGER, FROM THE MAILING DATE OF THIS COMMUNICATION.

- Extensions of time may be available under the provisions of 37 CFR 1.136(a). In no event, however, may a reply be timely filed after SIX (6) MONTHS from the mailing date of this communication.
- If NO period for reply is specified above, the maximum statutory period will apply and will expire SIX (6) MONTHS from the mailing date of this communication.
- Failure to reply within the set or extended period for reply will, by statute, cause the application to become ABANDONED (35 U.S.C. § 133). Any reply received by the Office later than three months after the mailing date of this communication, even if timely filed, may reduce any earned patent term adjustment. See 37 CFR 1.704(b).

**Status**

- 1) ☒ Responsive to communication(s) filed on 14 August 2008.
- 2a) ☐ This action is **FINAL**. 2b) ☒ This action is non-final.
- 3) ☐ Since this application is in condition for allowance except for formal matters, prosecution as to the merits is closed in accordance with the practice under *Ex parte Quayle*, 1935 C.D. 11, 453 O.G. 213.

**Disposition of Claims**

- 4) ☒ Claim(s) 1,5-7,11-13,17-21 and 25-30 is/are pending in the application.
- 4a) Of the above claim(s) \_\_\_\_\_ is/are withdrawn from consideration.
- 5) ☐ Claim(s) \_\_\_\_\_ is/are allowed.
- 6) ☒ Claim(s) 1,5-7,11-13,17-21 and 25-30 is/are rejected.
- 7) ☐ Claim(s) \_\_\_\_\_ is/are objected to.
- 8) ☐ Claim(s) \_\_\_\_\_ are subject to restriction and/or election requirement.

**Application Papers**

- 9) ☐ The specification is objected to by the Examiner.
- 10) ☐ The drawing(s) filed on \_\_\_\_\_ is/are: a) ☐ accepted or b) ☐ objected to by the Examiner.  
Applicant may not request that any objection to the drawing(s) be held in abeyance. See 37 CFR 1.85(a).  
Replacement drawing sheet(s) including the correction is required if the drawing(s) is objected to. See 37 CFR 1.121(d).
- 11) ☐ The oath or declaration is objected to by the Examiner. Note the attached Office Action or form PTO-152.

**Priority under 35 U.S.C. § 119**

- 12) ☐ Acknowledgment is made of a claim for foreign priority under 35 U.S.C. § 119(a)-(d) or (f).
- a) ☐ All b) ☐ Some \* c) ☐ None of:
1. ☐ Certified copies of the priority documents have been received.
  2. ☐ Certified copies of the priority documents have been received in Application No. \_\_\_\_\_.
  3. ☐ Copies of the certified copies of the priority documents have been received in this National Stage application from the International Bureau (PCT Rule 17.2(a)).

\* See the attached detailed Office action for a list of the certified copies not received.

**Attachment(s)**

- 1) ☒ Notice of References Cited (PTO-892)
- 2) ☐ Notice of Draftsperson's Patent Drawing Review (PTO-948)
- 3) ☐ Information Disclosure Statement(s) (PTO-883)
- 4) ☐ Interview Summary (PTO-413)  
Paper No(s)/Mail Date: \_\_\_\_\_
- 5) ☐ Notice of Informal Patent Application
- 6) ☐ Other: \_\_\_\_\_
- Paper No(s)/Mail Date: \_\_\_\_\_

## **DETAILED ACTION**

### ***Continued Examination Under 37 CFR 1.114***

1. A request for continued examination under 37 CFR 1.114, including the fee set forth in 37 CFR 1.17(e), was filed in this application after final rejection. Since this application is eligible for continued examination under 37 CFR 1.114, and the fee set forth in 37 CFR 1.17(e) has been timely paid, the finality of the previous Office action has been withdrawn pursuant to 37 CFR 1.114. Applicant's submission filed on August 14, 2008 has been entered.

### ***Response to Arguments***

2. Applicant's arguments with respect to claims 1, 5-7, 11-13, 17-21, and 25-30 have been considered but are moot in view of the new ground(s) of rejection.

### ***Claim Rejections - 35 USC § 103***

3. The following is a quotation of 35 U.S.C. 103(a) which forms the basis for all obviousness rejections set forth in this Office action:

(a) A patent may not be obtained though the invention is not identically disclosed or described as set forth in section 102 of this title, if the differences between the subject matter sought to be patented and the prior art are such that the subject matter as a whole would have been obvious at the time the invention was made to a person having ordinary skill in the art to which said subject matter pertains. Patentability shall not be negated by the manner in which the invention was made.

4. Claims 1, 7, 13, 19, 29, and 30 are rejected under 35 U.S.C. 103(a) as being unpatentable over Claessens et al (US Patent 7,222,255 B1) in view of Zerlan (US Patent 7,010,295 B1) and Hou et al (US Patent 6,901,051 B1).

Regarding to claims 1, 7, 13, and 19, Claessens discloses an apparatus for measuring the performance of a scalable network (fig. 2) comprising means 202 for preparing the network for testing (fig. 2 col. 6 lines 35-37); means 202 for establishing

an IP routing path for a session to be tested (fig. 2 col. 9 lines 61-67 and col. 10 lines 1-10), wherein said routing path having a server at a first end of said route and a client node at a second end of said route (fig. 3 col. 7 line 65-col. 8 line 14); means 212/218/224/232 in a server for sending a constant stream of packets to a client node 214/216/228/230 (fig. 2 col. 5 lines 19-27); and means 214/216/228/230 for counting said received packets by said client node (fig. 2 col. 14 lines 45-50).

Claessens fails to teach for the routing path is a static IP route.

However, Zerlan discloses a method and system for testing various elements in a communications network using static IP route (fig. 5 col. 7 lines 24-27).

Thus, it would have been obvious to a person of ordinary skill in the art, at the time of the invention, to arrange for testing of communications network using static IP route as taught by Zerlan in Claessens's system since such static IP route cost less to implement and offers more enhanced security than dynamic route.

Claessens and Zerlan together fail to teach for means for establishing a peak performance rate as the highest rate with no packet dropout.

However, Hou discloses a method and system for generating performance metrics of network traffic (fig. 1 and 2), wherein of the metrics is goodput measuring the average amount (peak performance rate) of useful data transferred between devices without having packets being dropout or loss (col. 5 lines 4-11).

Thus, it would have been obvious to a person of ordinary skill in the art, at the time of the invention, to employ such measuring metrics as taught by Hou into

Claessens and Zerlan's system to provide a status of network congestion for a particular communication path.

Regarding to claim 29, Claessens discloses the packet generator is configured to perform testing using software (fig. 2 col. 5 lines 27-32).

Regarding to claim 30, Claessens discloses for a test configuration file is download from a TFTP server (col. 5 lines 38-41).

5. Claims 5, 6, 11, 12, 17, 18, 20, 21, and 25-28 are rejected under 35 U.S.C. 103(a) as being unpatentable over Claessens, Zerlan, and Hou in view of Beverly, IV (U.S. Patent 6,732,182 B1).

Regarding to claims 5, 6, 11, 12, 17, 18, 20, 21, and 25-28, Claessens, Zerlan, and Hou disclose all the limitations with respect to claims 1, 7, 13, and 19 except for the constant stream of packets are sent over an OC-3 or OC-12 level networks. However, Beverly discloses a system for generating a packet loss report, wherein test packets are sends over an OC-3 or OC-12 level (col. 4 lines 21-26) via Ethernet pathways 224-228 (fig. 2 col. 6 lines 16-20). Thus, it would have been obvious to a person of ordinary skill in the art to employ a transmission of test packets over OC-3 and OC-12 network via Ethernet pathways as taught by Beverly in Claessens, Zerlan, and Hou's system for measuring the performance of high speed networks, such as SONET or SDH.

### ***Conclusion***

6. Any inquiry concerning this communication or earlier communications from the examiner should be directed to Duc T. Duong whose telephone number is (571)272-3122. The examiner can normally be reached on M-F (8:00 AM-5:00 PM).

If attempts to reach the examiner by telephone are unsuccessful, the examiner's supervisor, Wing Chan can be reached on 571-272-7493. The fax phone number for the organization where this application or proceeding is assigned is 571-273-8300.

Information regarding the status of an application may be obtained from the Patent Application Information Retrieval (PAIR) system. Status information for published applications may be obtained from either Private PAIR or Public PAIR. Status information for unpublished applications is available through Private PAIR only. For more information about the PAIR system, see <http://pair-direct.uspto.gov>. Should you have questions on access to the Private PAIR system, contact the Electronic Business Center (EBC) at 866-217-9197 (toll-free). If you would like assistance from a USPTO Customer Service Representative or access to the automated information system, call 800-786-9199 (IN USA OR CANADA) or 571-272-1000.

/D. T. D./  
Examiner, Art Unit 2419

/Wing F. Chan/  
Supervisory Patent Examiner, Art Unit 2419  
4/20/09